

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

No. 77-4057

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067, 77-4068, 77-4073, 77-4074, 77-4075

INTERNATIONAL BUSINESS MACHINES CORPORATION, et al.,
v. *Petitioners,*

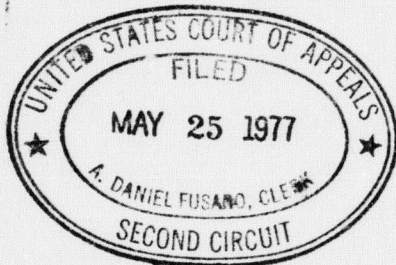
FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order of the
Federal Communications Commission

BRIEF FOR PETITIONER
INTERNATIONAL BUSINESS MACHINES
CORPORATION

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BRIEF FOR PETITIONER
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QUESTIONS PRESENTED

"Resale" of communications services occurs when a person obtains such services from a common carrier (such as a telephone company) and reoffers the services to others for profit. There is no economic or practical limit on the number of persons who can engage in resale, and the Federal Communications Commission ("Com-

mission") has concluded that common carriers should not be allowed to prohibit or restrict the resale of their services.

The questions presented are:

1. Did the Commission err in concluding that resellers of communications services must be deemed communications common carriers as that term is used in the Communications Act of 1934?

2. Even if resellers are deemed to be communications common carriers, did the Commission nevertheless err in concluding that it has no power to forbear from imposing on such resellers the regulatory requirements of Title II of the Communications Act, and in failing to consider whether it should exercise the power to forbear from regulating resellers?

REFERENCE TO RULING

The ruling of the Commission under review in this case is a Report and Order in *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), reproduced in the Joint Appendix ("J.A.") at I J.A. 28 ("Initial Order"), as modified by a Memorandum Opinion and Order in the same matter, 62 F.C.C.2d 588 (1977), I J.A. 152 ("Order on Reconsideration").

STATUTES INVOLVED

Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, provides:

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,

for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

Section 3 (a), 47 U.S.C. § 153 (a), provides:

" 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

Section 3 (b), 47 U.S.C. § 153 (b), provides:

" 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

Section 3 (d), 47 U.S.C. § 153 (d), provides:

" 'Transmission of energy by radio' or 'radio transmission of energy' includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission."

Section 3(h), 47 U.S.C. § 153(h), provides in pertinent part:

“‘Common Carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy....”

Section 201, 47 U.S.C. § 201, provides in pertinent part:

“(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

“(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications. . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”

STATEMENT OF THE CASE

This is a petition by International Business Machines Corporation (“IBM”) for review of a Report and Order

of the Commission, as modified on reconsideration, which held, *inter alia*, that resellers of communications offerings are communications common carriers and must be subjected to the regulatory requirements for common carriers set forth in Title II of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* ("the Communications Act").¹

The Decision of the Commission

Prior to the Commission's orders in this case, communications common carriers such as American Telephone and Telegraph Company ("AT&T") generally prohibited persons who subscribed to their private line services² from reselling those services to others. In some cases, the carriers also prohibited subscribers from sharing such services with others. These prohibitions were contained in tariffs for such services filed by AT&T and other carriers with the Commission.³ In 1974, the Commission

¹ These aspects of the Commission's orders adversely affect IBM as a manufacturer and supplier of data processing equipment, because the imposition of strict regulatory controls on resellers will inhibit the natural technological and economic development of resale services. IBM believes that growth and innovation in resale services will stimulate additional and innovative uses of data processing equipment.

² Private line services provide the subscriber with full-time lines between any two or more designated locations. The line charges are typically based on the number of points served and the distance between them and, as such, are insensitive to volume of usage. Users of such services are primarily government agencies and businesses that have a high volume of communications between two, or among several, specified points. Private line services are distinct from, and this case therefore does not involve, message telephone service (like that available in most homes and offices), which permits a person to communicate with any location in the nationwide telephone system and for which the charges (in the case of long distance and some local exchange service) are based on the amount of usage.

³ See *Initial Order*, 60 F.C.C.2d at 276-80, 1 J.A. 48-53. The tariffs typically contained specific exceptions to these prohibitions, which are not pertinent here. *Id.* at 278-80, 1 J.A. 51-53.

began an inquiry into these restrictions on resale and sharing, in which it posed two questions: (1) whether subscribers should be free to resell or share private line offerings; and (2) if so, whether and to what extent the Commission should regulate such resale and shared use.⁴

This rulemaking proceeding culminated in the orders here under review. In its *Initial Order*, the Commission held that the tariff restrictions which had been imposed on resale and sharing were unjust, unreasonable, and unlawfully discriminatory. The Commission ordered AT&T and others to submit revised tariffs eliminating such restrictions.⁵

The Commission defined "resale" as an activity in which a person subscribes to communications services and facilities and reoffers all or part of those services to others for profit.⁶ With respect to basic communications services, the reseller merely acts as an intermediary between the public and the underlying communications carriers. Communications resellers make bulk rates available by providing their customers with access to bulk transmission services. Resellers do not operate the wires or other apparatus over which the messages or data are transmitted. The underlying communications common carriers actually operate these wire or radio systems.

The Commission concluded that the elimination of restrictions on resale and sharing would result in substan-

⁴ *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Notice of Inquiry and Proposed Rulemaking, 47 F.C.C.2d 644, 656-57 (1974), 1 J.A. 12, 24-25.

⁵ *Initial Order*, 60 F.C.C.2d at 264-65, 282-89, 1 J.A. 31, 57-65.

⁶ *Id.* at 263, 271-74, 1 J.A. 31, 41-46. The Commission defined "share" as a nonprofit arrangement in which several persons collectively use communications services and facilities provided by a carrier, with each user paying the communications-related costs associated therewith according to its pro rata use of the communications services and facilities. *Id.* at 263, 274-76, 1 J.A. 31, 46-47.

tial public benefits. In particular, the Commission found that resale and sharing would "create further pressures on carriers to provide their services at rates which are wholly related to costs";⁷ would encourage better management of communications networks;⁸ would provide specialized management expertise both to the using public and to the carriers;⁹ and would heighten competition among those providing communications services, thereby creating additional incentives for research and development.¹⁰ The Commission further found that resale and sharing arrangements would reduce the waste of communications capacity that results from the dedication of private lines (or reservation of an equivalent capacity) to a single individual customer during those periods when the line is not in full use.¹¹

The Commission found that "competition in the resale market may be an inherent characteristic, given, *inter alia*, the apparent absence of a need for substantial investment."¹² The Commission concluded that "the reseller will operate in a highly competitive yet limited scope of environment, with no large monopoly service . . . to provide a cushion against competitive inroads" ¹³ It further found that "none of these [resale and sharing] activities, either separately or collectively, now exhibits substantial economies of scale or other natural monopoly or essential public service characteristics . . .," ¹⁴

⁷ *Id.* at 298-99, I J.A. 78; *see id.* at 265, 300-03, I J.A. 33, 80-83.

⁸ *Id.* at 299, I J.A. 79.

⁹ *Id.* at 300, I J.A. 80.

¹⁰ *Id.* at 302, I J.A. 82-83.

¹¹ *Id.* at 301, I J.A. 81-82.

¹² *Id.* at 309, I J.A. 93.

¹³ *Id.* at 299, I J.A. 79.

¹⁴ *Id.* at 301, I J.A. 81.

and that "[t]he natural tendency of the resale market will be to minimize the opportunity for one firm to charge excessive rates."¹⁵ The Commission concluded that the expansion of resale and sharing "will not significantly harm—and may in fact benefit—the underlying carriers themselves,"¹⁶ because resale and sharing will introduce new sources of supply and demand in the communications service industry, "without the addition of significant investments or resources," thereby expanding the overall use of communications services.¹⁷

The Commission forecast the development of a "two-tiered" interstate telecommunications industry.¹⁸ The "first tier" would be composed of regulated carriers offering basic transmission services both to the public generally and to other communications companies. The "second tier" would be composed of resellers, who would lease most of their facilities from the regulated first-tier carriers and then reoffer communications services to the public. Under the Commission's orders, resellers in this second tier would also be regulated as carriers.¹⁹

The Commission ruled that a person who engages in the resale of private line communications services becomes a "common carrier" under Section 3(h) and Title II of the Communications Act.²⁰ The Commission further held, on the premise that resellers are common carriers, that the Commission is legally compelled to subject them

¹⁵ *Id.* at 309 n.86, 1 J.A. 94 n.86.

¹⁶ *Id.* at 302, 1 J.A. 82.

¹⁷ *Id.*

¹⁸ *Id.* at 300, 1 J.A. 80.

¹⁹ *Id.*

²⁰ *Id.* at 304-08, 1 J.A. 86-92. The Commission ruled that entities engaged in sharing of communications services are not common carriers.

to much of the certification and rate regulation regime prescribed for interstate communications common carriers by Title II of the Communications Act.²¹ The Commission exempted resellers from making certain of the showings otherwise required in order to obtain certification, because of the inherent competitiveness of resale activities.²² The Commission indicated that it would consider pleadings opposed to the grant of certification.²³ The

²¹ *Id.* at 311-16, I J.A. 96-101. Communications common carriers must obtain certificates of public convenience and necessity in order to commence or expand their operations, and must also obtain Commission approval before eliminating particular services or ceasing business altogether. 47 U.S.C. § 214. When an application for such a certificate is filed, opposing parties may file petitions to deny the application, which the Commission must consider, often in hearing-type proceedings. *Id.* Communications common carriers must provide their services upon reasonable request. *Id.* § 201(a). The charges for and regulations pertaining to a carrier's services must be just and reasonable and may not be unjustly or unreasonably discriminatory. *Id.* §§ 201(b), 202. Communications common carriers must file tariffs with the Commission which reflect all charges for and regulations pertaining to their services. *Id.* § 203. Carriers must file a complete economic justification for their proposed rates. 47 C.F.R. § 61.38 (1976). The Commission may, at the request of any person or *sua sponte*, reject or suspend and investigate (hold hearings on) any tariff on the ground that it is or may be unlawful. *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865, 880 n.33 (2d Cir. 1973); 47 U.S.C. § 204. The Commission may also prescribe charges for a carrier's services. *Id.* § 205(a). The Commission may examine transactions that might affect the charges for a carrier's services (*id.* § 215), may require carriers to file periodic reports (*id.* § 219), may prescribe the forms for accounting and other records kept by carriers, and may inspect such records (*id.* § 220). The Commission may impose penalties for violations of these provisions. *Id.* § 205(b).

²² *Initial Order*, 60 F.C.C. 2d at 311-12, I J.A. 96-97. In particular, resellers are not required as a condition of certification to demonstrate a special need for service not now available, to demonstrate that the proposed service adds value, or to assess the economic impact of entry. *Id.* Applicants for certification as resellers are required to demonstrate that they are technically, legally, and financially qualified to provide the service they propose. *Id.* at 312, I J.A. 96.

²³ *Id.*

Commission rejected the contention that even if resellers may be deemed to be communications common carriers, the Commission has power to forbear from imposing strict common carrier regulation on them.²⁴ The Commission gave no consideration to whether such forbearance was in the public interest.²⁵

Commissioner Robinson dissented from the Commission's decision to treat resellers as common carriers subject to regulation under Title II. 60 F.C.C.2d at 337-41, 1 J.A. 144-48. He characterized the Commission's opinion as based on "the regulators' professional bias for regulation," and offered the following analogy:

"When I was in the Army, there used to be a saying: if it moves, salute it, if it doesn't move, paint it. In this branch of the government, we proceed according to a slightly different maxim: if it moves, regulate it; if it doesn't move, kick it—and when it moves, regulate it." *Id.* at 340-41, 1 J.A. 147-48.

Proceedings in This Court

On March 14, 1977, IBM petitioned this Court to review the Commission's *Initial Order*, as modified by its *Order on Reconsideration*. IBM's case has been consolidated with two petitions to review the same Commission orders filed in this Court by AT&T (No. 77-4057) and Securities Industry Automation Corporation (No. 77-4068) and with three additional petitions to review

²⁴ *Id.* at 313-14, 1 J.A. 98-99.

²⁵ Numerous parties including IBM sought reconsideration of various aspects of the Commission's *Initial Order*. On January 12, 1977, the Commission released its *Order on Reconsideration*, which modified its *Initial Order* in limited respects not pertinent to IBM's petition for review in this Court (although pertinent to issues which IBM had sought to raise in connection with its October 14, 1976, Motion for Leave to Intervene in *Western Union Telegraph Co. v. FCC* (No. 76-1853), which case has since been dismissed by stipulation, see note 26 *infra*).

the same orders filed by United System Service, Inc. (No. 77-4073), Telenet Communications Corp. (No. 77-4074), and Aeronautical Radio, Inc. (No. 77-4075), in the District of Columbia Circuit and transferred to this Court pursuant to 28 U.S.C. § 2112(a).²⁶ A motion by AT&T for a stay of the Commission's orders pending judicial review was denied by this Court on March 22, 1977. IBM has intervened on the side of the respondents with respect to the issues raised in the other consolidated cases.²⁷

SUMMARY OF ARGUMENT

I.

The Commission erred in concluding that resellers are communications common carriers under the Communications Act. Since a reseller of communications services does not engage in the actual "transmission" of any message, it does not engage in wire or radio communication or in radio transmission of energy as those terms are defined in Sections 3(a), (b), and (d) of the Act. Therefore it cannot be deemed to be a person "engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . .," within the meaning of Section 3(h) of the Act. See *ICC v. Delaware, L. & W. R.R.*, 220 U.S. 235 (1911). Moreover, the Commission's determination that resellers are communications common carriers is at odds with the Commission's legislative mandate under Section 1 of the Act

²⁶ Petitions to review the Commission's *Initial Order* were filed prior to release of the *Order on Reconsideration* by ITT World Communications, Inc., RCA Global Communications, Inc., and Western Union Telegraph Co. Those petitions have been dismissed by stipulation.

²⁷ IBM will file a timely brief as an intervenor in those cases supporting the Commission's decision to the extent challenged in those cases.

"to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges."

II.

Even if the Commission were correct in concluding that resellers are communications common carriers, the Commission erred in concluding that it was without power to forbear from imposing various Title II regulatory controls on resellers. *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966). The Commission erred in reading *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), to require in the circumstances here the imposition of such controls. Because of the Commission's erroneous assumption that it lacks discretion to forbear, the Commission further erred in failing to consider whether it was appropriate to refrain from imposing the regulatory regime for communications common carriers on resellers where resale was found to be naturally competitive and not susceptible to price distortions or monopolistic control.

ARGUMENT

Introduction

The Commission found that the resale field will be inherently competitive, that it will not be susceptible to monopoly or other anticompetitive practices, and that there are no unusual natural barriers to entry.²⁸ The Commission recognized that these circumstances lessen the need for pervasive economic regulation. For these reasons, the Commission relaxed certain of its certification requirements relating to the entry and exit of particular firms into and from the communications resale business.²⁹

²⁸ *Initial Order*, 60 F.C.C.2d at 299, 301-02, 1 J.A. 79, 81-83; see pages 7-8 *supra*.

²⁹ *Initial Order*, 60 F.C.C.2d at 311, 316, 1 J.A. 96, 101.

The economic and policy considerations which provided a foundation for the Commission's "open entry" policy for resellers provide an equally compelling basis for nonapplication of the remaining Title II certification and rate controls. Strict economic regulation of resellers will result in double regulation of many communications services, since the Commission already regulates the rates of the underlying common carriers that provide the transmission services. There is no reason for the Commission to regulate these services again when they are resold in the admittedly competitive resale industry. The unnecessary imposition of Title II regulation on resellers will inevitably inhibit growth of and innovative developments in the resale industry.

The Commission found it unnecessary to weigh these considerations, because of its view that it was legally foreclosed from considering them.³⁰ The Commission's refusal to consider the desirability of forbearance resulted from its erroneous conclusions that resellers are communications common carriers and that the Commission is legally compelled to impose the burdens of Title II on all communications common carriers. In Part I below, we demonstrate that resellers are not communications common carriers under the Communications Act. In Part II, we demonstrate that even if resellers were held to be communications common carriers, the Commission erred in concluding that it does not have discretion to forbear from imposing Title II's onerous controls and in failing to consider whether such forbearance was appropriate in the circumstances.³¹

³⁰ The Commission did not explain why it believed itself free to relax the entry requirements but not to consider relaxing or waiving other regulatory requirements under Title II.

³¹ We recognize that, if resellers are deemed to be communications common carriers, the questions whether and to what extent regulation of resellers is appropriate or necessary are matters of regulatory policy entrusted under the Act primarily to the Commission.

I. THE COMMISSION ERRED IN CONCLUDING THAT A RESELLER OF COMMUNICATIONS SERVICES IS A COMMUNICATIONS COMMON CARRIER AS DEFINED IN THE COMMUNICATIONS ACT.

Rejecting arguments by the Office of Telecommunications Policy and the Department of Justice,³² the Commission concluded that resellers are communications common carriers and, as such, are subject to much of the certification and rate regulation scheme of Title II of the Communications Act.³³ However, the Commission's conclusion that resellers are communications common carriers is inconsistent with the definitions in the Act which establish the meaning of that term, with pertinent precedents, and with the fundamental policy rationale of Title II regulation.

Section 3(h) of the Communications Act, 47 U.S.C. § 153(h), defines "common carrier" as follows:

"'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy..."

But the legal errors committed by the Commission have prevented it from reaching those issues. We therefore believe it appropriate for the Court to remand this matter to the Commission, to enable it to consider the policy questions it erroneously believed itself precluded from reaching. *C. J. Community Services v. FCC*, 246 F.2d 660, 664-65 (D.C. Cir. 1957).

³² "Reply Comments of the Office of Telecommunications Policy, Executive Office of the President," in *Regulatory Treatment of Communications Brokerage*, FCC Docket No. 20097, filed under cover of letter dated February 25, 1975; "Reply Comments of the United States Department of Justice," in *Regulatory Treatment of Communications Brokerage*, FCC Docket No. 20097, filed May 2, 1975, VI J.A. 1430.

³³ *Initial Order*, 60 F.C.C.2d 303-16, I J.A. 84-101. See note 22 *supra*.

In its *Initial Order* the Commission concluded that a reseller of communications services is a common carrier within the meaning of Section 3(h) of the Act because a reseller holds itself out to the public to provide communications services.³⁴

The Commission's analysis ignored a critical element in the Act's definitional scheme. The definition of "common carrier" requires not only that the person involved be a "common carrier" for hire; it also explicitly requires that the person be engaged in communication by wire or radio, or in transmission of energy by radio. Section 3 (a) of the Act, 47 U.S.C. § 153(a), defines "communication by wire" as

"the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and

³⁴ *Initial Order*, 60 F.C.C.2d at 308, 1 J.A. 92. The Commission relied to a large extent on *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) ("NARUC I"), and *National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("NARUC II"), and various common law cases. In *NARUC I*, the court concluded that certain Special Mobile Radio Services were not communications common carriers, and in *NARUC II*, the court concluded that cable television companies providing two-way, non-video communications services were acting as communications common carriers. Neither of these cases is dispositive of the issues in this proceeding, however, since the purported communications common carriers in both cases—unlike resellers—were in fact engaged in the actual interstate transmission of messages or data by wire or radio, or in radio transmission of energy. The common law cases are similarly unhelpful because they address only the question whether an entity is a common carrier, not whether that entity is a communications common carrier. Even if communications resellers fell within some common law definition of a common carrier, the question would remain whether the reseller satisfied the statutory definition in the Communications Act.

delivery of communications) incidental to such transmission." (Emphasis added.)

The statutory definitions of "communication by radio" and "transmission of energy by radio" in Sections 3(b) and (d) also require actual transmission.³⁵ Thus, an entity is not a communications common carrier under Sections 3(a), 3(b), 3(d), and 3(h)—even if it arguably comes within some common law definition of the term "common carrier"—unless it is actually engaged in transmitting messages or data by wire or radio, or in radio transmission of energy.

Resellers of communications services do not meet this test because they do not themselves perform the transmission function. That function is provided by the underlying communications carriers, such as AT&T. As noted above, as to the basic communications services, the reseller merely acts as an intermediary between the public and the underlying communications carriers. The reseller provides to the public the communications services it has leased from the underlying carriers, in a format or under conditions that the reseller believes will enable it to compete with the services provided directly by the underlying carriers and by other resellers. For instance, the reseller through economies resulting from efficient use of the lines furnished to it by underlying carriers may be able to furnish services to customers at lower rates or otherwise on more advantageous terms than are

³⁵ Section 3(b) of the Act defines "communication by radio" as "the *transmission* by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(b) (emphasis added).

Section 3(d) of the Act provides that the "transmission of energy by radio" includes "both such transmission and all instrumentalities, facilities and services incidental to such transmission." 47 U.S.C. § 153(d).

available from carriers. Some resellers act exclusively as middlemen, subscribing to private lines or discounted bulk transmission services and reselling portions of those transmission services to various customers whose needs are insufficient to justify their individual subscription to such services. Some resellers of the transmission services offer additional services or facilities (such as facsimile communications and data processing) over and above the transmission services provided by the underlying carriers.³⁶ But whatever other services are provided, it is the underlying carrier, not the reseller, who performs the actual transmission by wire or radio.

This construction of the Communications Act is directly supported by a series of decisions under the Interstate Commerce Act relating to freight forwarders. Those decisions are particularly apposite here, because most of the provisions of the Communications Act relating to common carrier regulation were derived verbatim from the Interstate Commerce Act.³⁷

As the Federal Communications Commission has conceded in this case ³⁸—the operations of freight forwarders are analogous to those of communications resellers.³⁹

³⁶ The Commission has characterized the first type of communications reseller as a "broker" and the second as a "processor." *Initial Order*, 60 F.C.C.2d at 271-74, 1 J.A. 41-46.

³⁷ 49 U.S.C. § 1 *et seq.* The Senate Report on the Communications Act states that any "variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective." S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934). See also H.R. Rep. No. 1850, 73d Cong., 2d Sess. 5 (1934).

³⁸ *Initial Order*, 60 F.C.C.2d at 281, 284 n.63, 305, 1 J.A. 56, 59 n.63, 87-88. See description of communications resale services at pages 16-17 *supra*.

³⁹ Freight forwarders, who are generally independent of rail common carriers, solicit small shipments of goods, consolidate them,

Freight forwarders make bulk rates available to individual shippers by providing the shippers access to a mode of bulk carriage; but the forwarders do not perform that carriage. The rail common carriers actually transport the shipments to their destinations. As noted above, like freight forwarders, communications resellers make bulk rates available by providing their customers with access to bulk transmission services; but the resellers do not operate the wires or other apparatus over which the messages or data are transmitted. The underlying communications common carriers actually operate these wire or radio systems.

The Interstate Commerce Act provides in part that its provisions "shall apply to common carriers engaged in . . . the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water" ⁴⁰ "Common Carriers" are defined as "all persons . . . engaged in such transportation . . . as common carriers for hire." ⁴¹

As the Federal Communications Commission acknowledged in its *Initial Order* in this proceeding,⁴² this lan-

and reship them in bulk via common carrier, taking advantage of the lower rates available for bulk shipments of certain sizes. The forwarder acts as both consignor and consignee of the goods; he arranges to separate out the individual shipments from the bulk shipment and sees that they are delivered to their final destinations. The forwarder makes his profit by charging a rate above what he pays the carrier for the bulk shipment, but below what the carrier would have charged for each individual small shipment. For a more complete description, see *ICC v. Delaware, L. & W. R.R.*, 220 U.S. 235 (1911); *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344 (1940).

⁴⁰ 49 U.S.C. § 1(1).

⁴¹ 49 U.S.C. § 1(3)(a). The language of the Communications Act quoted at page 14 *supra* was derived from this language. See note 37 *supra*.

⁴² *Initial Order*, 60 F.C.C.2d at 306, 1 J.A. 88-89.

guage has been construed to give the Interstate Commerce Commission ("ICC") jurisdiction only over the railroad companies that are actually "engaged" in the "transportation of passengers or property." The ICC consistently refused to regulate freight forwarders under its jurisdiction over rail common carriers provided in the Interstate Commerce Act.⁴³ In decisions that were uniformly upheld by the Supreme Court, the ICC repeatedly held that freight forwarders must be treated as any other shipper via common carrier,⁴⁴ even though a freight forwarder "has characteristics of a common-carrier transportation agency" ⁴⁵

When the ICC was statutorily authorized to regulate "common carriers by motor vehicle" under the Motor Carrier Act,⁴⁶ the ICC interpreted its statutory authority in the same way as it had under the Interstate Commerce Act. The Motor Carrier Act at that time defined a "common carrier by motor vehicle" as

"any person who undertakes, whether directly or by a lease or any other arrangement, to transport pas-

⁴³ *Freight Forwarding Investigation*, 229 I.C.C. 201, 302-04 (1938).

⁴⁴ *ICC v. Delaware, L. & W. R.R.*, *supra*; *Great Northern Ry. v. O'Connor*, 232 U.S. 508 (1914); *Lehigh Valley R.R. v. United States*, 243 U.S. 444 (1917); *Merchants Warehouse Co. v. United States*, 283 U.S. 501 (1931).

⁴⁵ *Freight Forwarding Investigation*, *supra*, 229 I.C.C. at 304. In a similar case involving an express company, the Supreme Court offered a lengthy explanation of its holding that the express company could not be regulated by the ICC as a "carrier by railroad." *United States v. American Railway Express Co.*, 265 U.S. 425, 430-34 (1924). In essence, the Court explained that "[t]he natural meaning of the term 'carrier by railroad' is one who operates a railroad, not one whose shipments are carried by a railroad." *Id.* at 432.

⁴⁶ 49 U.S.C. § 301 *et seq.*, as added August 9, 1935, c. 498, 49 Stat. 543, and amended September 18, 1940, c. 722, Title I, § 15, 54 Stat. 919.

sengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation. . . ."⁴⁷

The ICC and the courts consistently construed this language to give the ICC jurisdiction to regulate as common carriers the trucking companies that actually engaged in such transportation, but not freight forwarders, because "common carriers by motor vehicle" must "'actually physically operate the vehicle or control the management and conduct of those who conduct the operations.'"⁴⁸ In affirming the ICC's decision, a three-judge court held that although the "forwarding companies are doubtless responsible to their customers as common carriers at common law we think it clear that none of them is a 'common carrier by motor vehicle' within the meaning of the Motor Carrier Act."⁴⁹

⁴⁷ 49 U.S.C. § 203(a)(14), as quoted in *Acme Fast Freight, Inc.: Common Carrier Application*, 2 M.C.C. 415, 422 (1937). This provision has since been revised and recodified as 49 U.S.C. § 303(a)(14).

⁴⁸ *Acme Fast Freight, Inc.: Common Carrier Application*, 8 M.C.C. 211, 216, 217-21 (1938), *aff'g in part and rev'g in part on other grounds*, 2 M.C.C. 415 (1937), *aff'd*, *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968 (S.D.N.Y.), *aff'd per curiam*, 309 U.S. 638 (1940); *United States v. Chicago Heights Trucking Co.*, *supra*.

⁴⁹ *Acme Fast Freight, Inc. v. United States*, *supra*, 30 F. Supp. at 973. The court further pointed out that "forwarders not directly engaged in the carriage of goods should not be held common carriers within the meaning of the Act [because] such forwarders have done a large business for years and have never been subjected to control by the [Interstate Commerce] Commission." *Id.* at 972.

Freight forwarders continued to be free of such regulation until the Interstate Commerce Act was expressly amended in 1942 and in 1950 to include forwarders as common carriers within the ICC's jurisdiction. 49 U.S.C. § 1001 *et seq.*, as amended May 16, 1942, c. 722, 56 Stat. 284; 49 U.S.C. § 1002(5), as amended December 20, 1950, c. 1140, Section I, 64 Stat. 1113. See also *Chicago, M., St.P. & P. R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949).

In its *Initial Order* in this case, the Commission recognized that freight forwarders "were not subject to common carrier regulation by the ICC unless they actually controlled the means of transportation."⁵⁰ The Commission further acknowledged that resellers of communications services perform a role analogous to that of freight forwarders in the transportation field.⁵¹ The conclusion is inescapable that, just as freight forwarders do not "engage in transportation" and are not "common carriers" under the Interstate Commerce Act, resellers of communications services do not engage in transmission by wire or radio and consequently are not communications common carriers under the Communications Act.

Moreover, the Commission's decision that resellers are communications common carriers is inconsistent with the Commission's general legislative mandate "to make available, as far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."⁵² The Commission—with judicial approval—has described this statutory direction as "the basic touchstone for decision."⁵³

⁵⁰ *Initial Order*, 60 F.C.C. 2d at 307, 1 J.A. 89.

⁵¹ *Id.* at 281, 284 n.63, 305, 1 J.A. 56, 59 n.63, 87-88.

⁵² Section 1 of the Communications Act, 47 U.S.C. § 151.

⁵³ *Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules*, First Report and Order, 29 F.C.C.2d 870, 901 (1971), *aff'd*, *Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142, 1151, 1157 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). See also *United States v. Midwest Video Corp.*, 406 U.S. 649, 655, 669-70 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968); *National Broadcasting Co. v. United States*, 319 U.S. 190, 213-18 (1943); *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 854 (5th Cir. 1971); *C. J. Community Services v. FCC*, *supra*, 246 F.2d at 663.

The Commission's orders in this case fail entirely to consider this fundamental statutory policy.⁵⁴ The Commission did not find that its statutory interpretation classifying resellers as communications common carriers was necessary to or even consistent with achievement of the Commission's mandate as explained in Section 1 of the Act. And indeed it could not. The restraints imposed on resellers by Title II regulation must inevitably limit their flexibility and increase their costs, particularly because the Commission is imposing a heavy regulatory burden not once, but *twice* on each sale of services by communications resellers. The services provided by the underlying carrier are already subject to all of Title II's strict controls. Under the Commission's orders, when these services are sold by resellers, they will *again* be made subject to these same onerous controls. In the competitive resale environment, any diminution in flexibility or increase in cost will result in a decrease in efficiency, a contraction in the scope and adequacy of services offered, an increase in charges, or some combination of these effects. Those results are directly contrary to the Commission's legislative mandate as expressed in Section 1 of the Communications Act.

As the Commission has itself recognized, economic regulation under Title II is necessary only in limited circumstances which the Commission has found are not present here:

"In this country, we rely upon the 'free enterprise' system with the maximum possible latitude for individual initiative to enter into any given enterprise and compete for the available business. Our anti-trust laws are designed to prevent restraint of trade. Government intervention and regulation are limited to those areas where there is a natural monopoly, where economies of scale are of such magnitude as

⁵⁴ See pages 8-10 *supra*.

to dictate the need for a regulated monopoly, or where such other factors are present to require governmental intervention to protect the public interest because a potential for unfair practices exists.”⁵⁵

Judged by this standard, Title II regulation of resellers is unwarranted. The Commission described a “highly competitive ‘information handling’ industry,” which it stated did not “exhibit substantial economies of scale or other natural monopoly or essential public service characteristics.”⁵⁶ In this situation, the Commission’s decision to classify resellers as communications common carriers under the Act contravenes the Commission’s legislative mandate.

II. EVEN IF THE COMMISSION’S CONCLUSION THAT RESELLERS ARE COMMUNICATIONS COMMON CARRIERS WERE SUSTAINABLE, THE COMMISSION ERRED IN CONCLUDING THAT IT LACKS POWER TO FORBEAR FROM IMPOSING ON RESELLERS THE REGULATORY CONTROLS OF TITLE II OF THE COMMUNICATIONS ACT AND IN FAILING TO CONSIDER WHETHER AND TO WHAT EXTENT FORBEARANCE WAS APPROPRIATE IN THE CIRCUMSTANCES.

The Commission refused to consider policy questions relating to the desirability of imposing Title II controls on resellers. It concluded that, once it had decided that

⁵⁵ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities* (Docket No. 16979), Tentative Decision of the Commission, 28 F.C.C.2d 291, 297 (1970) (“Tentative Decision”), modified, 28 F.C.C.2d 267 (1971) (“Final Decision”), *aff’d in part and rev’d in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 F.C.C.2d 293 (1973). In this brief, we refer to the proceeding as “*Computer Inquiry I*.”

⁵⁶ *Initial Order*, 60 F.C.C.2d at 301, 1 J.A. 81. See *id.* at 299, 1 J.A. 79.

resellers are communications common carriers, it was legally compelled to impose those controls generally. At the same time, however, the Commission, without any explanation of its inconsistency, elected to forbear the imposition of certain common carrier entry requirements and, while the *Initial Order* is far from clear, perhaps some aspects of rate regulation. We believe that to the extent the Commission exercised forbearance, it acted within its power. To the extent it ruled itself powerless to forbear in other respects, its legal conclusion is demonstrably erroneous.

The courts and the Commission itself have held that the Commission has broad discretion to exercise forbearance where it concludes that regulation would not serve the policy of the statute or the public interest. In *Philadelphia Television Broadcasting Co. v. FCC*, *supra*, the court upheld the Commission's refusal to impose common carrier regulatory controls on community antenna television systems. The court explained why the Commission should be granted considerable discretion to decide how to regulate such new communications developments, in terms equally applicable to the embryonic resale industry:

"Congress in passing the Communications Act of 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry." *Id.* at 284.

For these reasons, the court correctly concluded that:

"In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be

most effective in advancing the Congressional objective." *Id.*

In effect, the court held that the Commission was not required to apply any of the comprehensive certification and rate regulation scheme prescribed by Title II, even though it might be assumed that community antenna television systems were communications common carriers under the Act.

In a more recent case involving the Commission, the District of Columbia Circuit cited *Philadelphia Television Broadcasting, supra*, as holding that "a part of the broad discretion allowed the Commission under the Act involves the power not to exercise particular authority which it has been granted." *NARUC II, supra*, 533 F.2d at 620 n.113. See *C.J. Community Services v. FCC, supra*. The court again registered its view that "there may be arguments for allowing the Commission to decline to exercise its statutory powers" *Id.*

In *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975), the Ninth Circuit upheld a Commission decision to refrain on an interim basis from imposing common carrier controls on cable television access channels, even though such channels might appropriately be considered common carriers, where the Commission has concluded that the absence of such regulation would better promote the development of access channel use. The District of Columbia Circuit has since characterized the *ACLU* decision as "holding that the Commission had discretion to refuse to exercise its common carrier regulatory power" *NARUC II, supra*, 533 F.2d at 620.

The Commission itself has repeatedly recognized that it indeed possesses discretion to forbear. The particularly striking example can be found in its "*Computer Inquiry I*" decision, *supra*. In that case, the Commission

explicitly discussed the question whether it has discretion to forbear from imposing communications common carrier regulation where it believes it has jurisdiction. The Commission concluded that it possesses

"[d]iscretionary latitude, under the Communications Act and relevant judicial interpretations thereof, to refrain from subjecting a marginal activity to our regulatory process where it is clear that the public interest will be served by such a course."⁵⁷

The Commission further concluded that:

"[w]ithin the statutory scheme of regulation applicable to interstate common carrier services, the Commission may exercise appropriate discretion as to the methods and policies that will best serve the public interest. . . ."⁵⁸

The Commission explained the basis for its conclusion that it had discretion to forbear in terms directly applicable to this case:

"We are not required to assert and exercise such jurisdiction merely because we might construe the activity as one which would be encompassed within the intent of the Communications Act of 1934 [quoting and citing Philadelphia Television Broadcasting, supra].

"It appears to us that in reaching a decision as to how we are to exercise our discretion, we should look to the basic purpose of regulatory activity in the context of our general national policy, as well as the specific statutory guidelines given this agency. . . . Government intervention and regulation are limited to those areas where there is a natural monopoly, where economies of scale are of such magnitude as to dictate the need for a regulated monopoly, or where

⁵⁷ *Computer Inquiry I*, Final Decision, 28 F.C.C.2d at 277-78.

⁵⁸ *Id.* at 278.

such other factors are present to require governmental intervention to protect the public interest because a potential for unfair practices exists."⁵⁹

The Commission has in analogous contexts relaxed the rigors of its communications common carrier rate regulation scheme. For example, in *American Satellite Corporation*, 55 F.C.C.2d 1 (1975), a proposed reduction in a tariff filed by American Satellite Corporation was challenged by a competitor on the ground that the rates were no longer compensatory. *Id.* at 2. The Commission agreed that a question existed as to whether the rates were compensatory, but concluded nevertheless that this did not require suspension of the rate, as it generally would in other circumstances. The Commission explained its decision as follows:

"Since [American Satellite Corporation] does not offer any basic or so-called 'monopoly' services whose users might be burdened as a result of losses in the competitive environment, we find no public interest justification for requiring that rates be fully compensatory at all stages of operations. . . . In fostering the development of satellite, as well as terrestrial, specialized common carriers . . . we . . . decided to maintain regulatory flexibility at the outset to encourage such carriers to undertake 'service and technical innovation and to provide an impetus for efforts to minimize costs and charges to the public.' . . . In

⁵⁹ *Id.* at 297 (emphasis added). In *GTE Service Corp.*, *supra*, this Court held that the Commission does not have jurisdiction to regulate data processing services except where the provision of those services by a regulated common carrier harms, or threatens to harm, the provision of that carrier's regulated communications services. 474 F.2d at 732-36. Although this Court's holding in *GTE* holds erroneous the underlying assumption in *Computer Inquiry I* that the Commission had jurisdiction to regulate data processing, *GTE* did not question the Commission's general conclusion in *Computer Inquiry I* that the Commission does possess discretion to forbear from exercising jurisdiction where it in fact possesses such jurisdiction.

adopting this policy we . . . were hopeful also that competition among specialized carriers would obviate some of the need for the kind of strict rate regulation that is necessary in the case of basic or monopoly services."⁶⁰

The Commission went on to conclude that because American Satellite Corporation provided a limited range of competitive, nonmonopoly services which were available from other sources, it "*should be free reasonably to compete and to offer such rates as it believes will establish itself in the market.*" *Id.* at 3 (emphasis added). In view of the similar business circumstances of American Satellite Corporation and resellers of communications services, the Commission's reasoning manifestly should have been applicable in this case.

The Commission has forborne from imposing the full array of communications common carrier regulatory controls of other contexts. For example, the Commission has since 1965 exempted from Title II rate regulation interstate radio communications common carriers in the Domestic Public Land Mobile Radio Service where such carriers are subject to regulation by state or local authorities in their areas of operation, even if the states do not actually exercise such authority.⁶¹ The Commission evidently considered that it possesses discretion to leave regulation of these radio common carriers to the states, even though the Communications Act does not explicitly state that the Commission may delegate its authority.

Another example of Commission forbearance is found in the area of industrial, scientific, and medical equip-

⁶⁰ *American Satellite Corporation, supra*, 55 F.C.C.2d at 2, quoting *Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities*, Second Report and Order, 35 F.C.C.2d 844 (1972).

⁶¹ FCC Public Notice, FCC 65-805 (Sept. 16, 1965), reissued, May 15, 1975.

ment. Such equipment transmits energy which can interfere with radio frequencies, thus bringing the equipment squarely within the Commission's jurisdiction over radio under Title III of the Communications Act.⁶² Although the Commission has found that it has jurisdiction over all such equipment, it nevertheless does not require the licensing of all such equipment pursuant to Sections 301 and 308 of the Act.⁶³ Rather, with respect to certain equipment whose emissions fall within prescribed ranges the Commission has exercised its discretion to require only registration, a less comprehensive regulatory

⁶² See 47 C.F.R. Part 18 (1976).

⁶³ *Id.* Section 301, 47 U.S.C. § 301, provides in pertinent part:

" . . . No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

Section 308, 47 U.S.C. § 308 provides in pertinent part:

"(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it

"(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee. . . ."

device than the licensing procedures which Section 301 might on its face seem to require.

On a number of occasions, courts have upheld decisions of other federal regulatory agencies declining to impose statutory regulatory controls over entities within their jurisdiction. For example, in *Pan American World Airways v. CAB*, 392 F.2d 483 (D.C. Cir. 1968), the Civil Aeronautics Board concluded that although it had jurisdiction over certain foreign tour operators, it could and would decline to exercise such jurisdiction because, in its view, the imposition of controls over foreign tour operators would not on balance serve the public interest. The District of Columbia Circuit, agreeing that the Board had jurisdiction over foreign tour operators, upheld the Board's decision not to invoke that jurisdiction. *Id.* at 490, 495-96. The court reached this conclusion despite its acknowledgment that the Board had no express statutory authority to decline to regulate and that the statute read literally seemed to require the Board to hold a hearing prior to issuing a permit to foreign tour operators. *Id.* The court reasoned that if the statute was not construed to give the Board implied discretion to forbear, the resulting imposition of controls would fail to advance the purposes of the statute and frustrate the policies of the Board. *Id.*

The National Labor Relations Board has also carved out from its jurisdiction particular areas which as a matter of policy discretion it has chosen not to regulate. For example, the Board will not exercise its jurisdiction over certain infractions which arise in connection with firms whose annual revenues do not exceed a floor established by Board rules. The Supreme Court has long recognized without disapproval the practice under which the Board "has never exercised the full measure of its jurisdiction." *Guss v. Utah Labor Board*, 353 U.S. 1, 3 (1957).

In sum, the Commission's conclusion that it must impose Title II controls over resellers once it has determined that they are communications common carriers within the Commission's jurisdiction is inconsistent with judicial precedent and the Commission's own prior decisions. The Commission in its *Initial Order* appears to read the Supreme Court's decision in *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), as requiring the Commission to impose Title II regulation in this case.⁶⁴ However, the *FPC v. Texaco* decision will bear no such reading.

In *FPC v. Texaco*, the Supreme Court reviewed a rule issued by the Federal Power Commission ("FPC") which permitted small independent natural gas producers to set their prices for natural gas sales to regulated pipelines based solely on market conditions. The FPC had a statutory duty to assure that the rates set by such small producers were "just and reasonable."⁶⁵ The Supreme Court held that the FPC could satisfy that duty by regulating such rates indirectly rather than directly, as long as it did not permit market price to be the sole measure of the "just and reasonable" standard.

The Court stated that the legislative history of the Natural Gas Act compelled it to reach the conclusion that the FPC could not let market price alone determine the reasonableness of rates. That legislative history revealed that the principal reason Congress enacted the Natural Gas Act was to deal with a situation in which "monopolistic forces" in the "heavily concentrated" natural gas industry were "distorting the market price for natural gas." *Id.* at 397-401. Thus, in the context of the natural gas industry, exclusive reliance on the market price as a measure of the "just and reasonable" standard "would contradict the basic assumption that has

⁶⁴ See *Initial Order*, 60 F.C.C.2d at 314, 1 J.A. 99.

⁶⁵ Natural Gas Act, §§ 4, 5, 15 U.S.C. §§ 717c, 717d.

caused natural gas production to be subjected to regulation'" *Id.* at 398, quoting *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 25 (1968).

The basis for the Court's interpretation of the Natural Gas Act in *FPC v. Texaco* was the legislative determination that natural gas consumers could not be adequately protected if the rates for natural gas were decontrolled at any point during production and transmission. The Court's reliance on *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), emphasizes this point. In *Phillips*, the Court held that the FPC had jurisdiction over independent natural gas producers who did not engage in the interstate transmission of gas, but rather sold their gas to transmission companies for resale. The Court reasoned:

" . . . [T]he rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural gas companies was the primary aim of the Natural Gas Act." *Id.* at 685.

Thus, in both *FPC v. Texaco* and *Phillips v. Wisconsin* the Court was presented with a situation where a failure to regulate producers' rates would leave the consumer unprotected, since the rate at which the producers sold to the interstate pipelines would affect the price ultimately paid by the consumer. The central purpose of the Natural Gas Act—protection of the ultimate consumer—would have been thwarted by a failure to regulate in those circumstances.

The situation addressed by the Court in *FPC v. Texaco* and *Phillips v. Wisconsin* is clearly unlike the circumstances of the present case. Nonregulation of resellers' rates cannot in any way undermine the protection afforded the consumer by the Communications Act, because the consumer can always obtain communications

services from the resellers' competitors—the underlying communications common carrier such as AT&T, whose rates are fully regulated by the Commission.

Moreover, Commission forbearance from directly regulating the rates charged by resellers could not result in allowing market prices to be the exclusive determinant of the justness and reasonableness of those rates. As we have noted, the Commission already fully regulates the rates established by the underlying communications common carriers, from whom resellers obtain the transmission services they resell.⁶⁶ Obviously, the rates charged by the underlying carriers, which are subject to strict Commission oversight and control, will determine to a significant degree the rates charged by the resellers. The ability of any prospective customer of a reseller to obtain services directly from the underlying carrier (as well as from competing resellers) will eliminate any significant possibility of excessive pricing by resellers.⁶⁷

In effect, then, forbearance from direct rate regulation of resellers would amount only to a decision not to regulate the rates for the same services *twice*. Indeed, the effective indirect regulation of resellers' rates through direct regulation of the underlying carriers' rates is the type of indirect regulation generally approved in *FPC v. Texaco, Inc.*, 417 U.S. at 386-93.

⁶⁶ As discussed above (page 8 *supra*), the Commission's orders foresee a "two-tiered" industry, with traditional regulated common carriers such as telephone companies in the first tier and such entities as resellers in the second tier.

⁶⁷ As a practical matter, the reseller must set a rate for its services somewhere between the lower rate (established pursuant to Commission regulation) charged by the underlying carriers for the bulk private line services resellers obtain from them and the higher rate (again established pursuant to Commission regulation) charged "retail" users by the underlying carriers for non-bulk services. The opportunity for communications customers to achieve cost savings by entering into nonprofit sharing arrangements will further restrict the reseller's pricing latitude.

Finally, as the Commission acknowledged in its orders, the resale industry—unlike the natural gas industry—is inherently competitive. “The natural tendency of the resale market will be to minimize the opportunity for one firm to charge excessive rates.”⁶⁸ Thus, even if the Communications Act embodies a concern that prices determined solely by the market might be unreliable in producing “just and reasonable” prices for natural monopoly services, that concern has no application in the context of the regulation of resellers. The Commission’s conclusion that it was nevertheless required to impose certification and rate regulation procedures was based on a wooden interpretation of the Communications Act, wholly at odds with a well-established principle:

“The Commission’s authority is stated broadly to avoid the need for repeated congressional review and revision of the Commission’s authority to meet the needs of a dynamic, rapidly changing industry.”⁶⁹

The Commission’s broad reading of *FPC v. Texaco* as requiring regulatory agencies to exercise their statutory authority to the fullest in all instances has not been accepted by any court. The decisions in *NARUC II* and *ACLU v. FCC*, *supra*, were handed down after the Supreme Court’s decision in *FPC v. Texaco*. The Supreme Court’s narrow holding in *FPC v. Texaco*, which was explicitly based on the legislative history of the Natural Gas Act and not on general principles of administrative law, does not overrule the established doctrine that the Commission may exercise its informed discretion to determine whether forbearance from the exercise of certain of its regulatory powers would promote the pur-

⁶⁸ *Initial Order*, 60 F.C.C.2d at 309 n.86, 1 J.A. 94 n.85.

⁶⁹ *Washington Utilities & Transportation Comm’n v. FCC*, *supra*, 513 F.2d at 1157; see, e.g., *Philadelphia Television Broadcasting Co. v. FCC*, *supra*; see *National Ass’n of Theatre Owners v. FCC*, 420 F.2d 194, 199 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

poses of the Communications Act. The Commission erred in concluding that it had no such discretion and in failing to consider whether common carrier regulation was appropriate for resellers.

REQUESTED RELIEF

IBM urges the Court to reverse the Commission's orders insofar as they hold that resellers are communications common carriers. In the alternative, IBM urges the Court to reverse the Commission's orders insofar as they hold that the Commission does not have power to forbear from fully regulating communications common carriers and remand the case with instructions that the Commission consider whether it is appropriate to forbear from imposing such regulation on resellers.

CONCLUSION

For the foregoing reasons, the relief requested should be granted.

Respectfully submitted,

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April 18, 1977

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